Supreme Court, U.S.
F I L E D
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NO. 91-2004

IN THE

SUPREME COURT OF THE

UNITED STATES

October 1991 Term

CITY OF FENTON,

a Michigan Municipal Corporation,

Petitioner,

v

GRAND TRUNK WESTERN RAILROAD COMPANY,

a Michigan Corporation,

Respondent.

SUPPLEMENTAL BRIEF TO PETITION FOR WRIT OF CERTIORARI TO THE MICHIGAN SUPREME COURT

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I. PARTIES TO THE PROCEEDING AND RULE 29.1 STATEMENT

The City of Fenton, Petitioner, is a Michigan Municipal Corporation that has no parent companies or subsidiaries.

Grand Trunk Western Railroad Company is a Michigan Corporation.

A Rule 29.1 List of Subsidiary Companies of Grand Trunk Western Railroad Company is found in Appendix A on page 1a of Respondent's Brief in Opposition and that Appendix is incorporated herein by reference.

A Rule 29.1 List of Parent Companies of Grand Trunk Western Railroad Company and Their Subsidiaries is found in Appendix B, page 2a of Respondent's Brief in Opposition and that Appendix is incorporated herein by reference.

II. MEMORANDUM OF LAW PURSUANT TO RULE 15.7

As a courtesy to this Honorable Supreme Court of the United States, your Petitioner, the City of Fenton, hereby calls to the Court's attention a new case that was not available at the time of the City of Fenton's last filing. On June 15, 1992 the City of Fenton filed its Petition for Writ of Certiorari and on June 29, 1992 this Court granted Certiorari in CSX Transportation, Inc. (United States Supreme Court No. 91-1206 and hereinafter referred to as Easterwood.)

In Easterwood, a man was killed when the truck he was driving was struck by a freight train operated by CSX Transportation, Inc. The spouse of the deceased filed a wrongful death action against CSX Transportation, Inc. The widow alleged that CSX was liable because

the train that struck her husband's truck was traveling at an excessive speed. The United States Court of Appeals was asked to determine the extent to which state law tort claims are preempted by the Federal Railway Safety Act (Easterwood, pages 1 and 2).

Kenneth W. Starr, Solicitor General of the United States, poignantly sets forth the issue before this Court in Easterwood on page (I) of his Brief for the United States Amicus Curiae:

> "Whether federal statutes and regulations setting speed limits for trains on all classes of track nationwide preempt a state law cause of action against a railroad for operating its train at an unreasonably excessive speed."

The issue in Easterwood is strikingly similar to the issue in City of Fenton v Grand Trunk Railroad Company (United

States Supreme Court No. 91-2004; hereinafter referred to as City of Fenton v Grand Trunk). Although the issue in City of Fenton v Grand Trunk has been variously stated by the parties; in essence, the question is whether federal statutes and regulations setting speed limits for freight trains preempt a municipal ordinance that seeks to prohibit an unreasonably excessive freight train speed at a crowded intersection that is a safety hazard.

It follows that both Easterwood and City of Fenton v Grand Trunk zero in on a common question concerning an exception to federal preemption.

One of the parts of 45 USC 434 that constitute an exception to preemption commonly relied upon by the Cross-Petitioner in Easterwood and the Petition in the City of Fenton v Grand Trunk is as follows:

"A State may...continue in force

any law...relating to railroad safety until such time as the Secretary has adopted a... regulation covering the subject matter of such state requirement."

The Cross-Petitioner in Easterwood argues that the federal regulation that the Secretary of Transportation has adopted has to do with "...how fast a train can travel and not derail..." (Respondent's Cross-Petition for Writ of Certiorari from the United States Court of Appeals for the Eleventh Circuit, page 5, line 15). The Petitioner in City of Fenton v Grand Trunk also contends that the subject matter for the federal regulation is derailment and points out that the federal regulation prescribes only "the initial minimum safety requirements for railroad track..." 49 CFR 213.1.

Further, the Code of Federal Regulations drafted by the Secretary of Transportation specifically indicate that the freight train speeds are not for crowded and dangerous crossings; but rather they are for "track conditions existing in isolation." (49 CFR 213.1). The interpretation of the meaning of 49 CFR 213.1 is beyond the scope of this Supplemental Petition and will no doubt be a subject of considerable study for the Solicitor General before he files his Brief in Easterwood. This writer feels certain that if an affidavit is sought from Andrew Card, Secretary of Transportation for the United States, it will become clear that the freight train speeds set by the Secretary of Transportation do not concern themselves with track in crowded or dangerous areas; but rather apply to principles of a safe train track to prevent derailment. Ultimately, the question of what 49 CFR 213.1, et. seq. means is a question of law and the

four squares of this regulation must be read and understood and ambiguous committee reports must be disregarded and the text should be given "...its fair meaning, whatever various committees might have had to say--thereby affirming the proposition that we are a government of laws not of Committee Reports." (As eloquently put by Justice Anthony Scalia in a case that is important to the instant quandary , Wisconsin Public Intervenor v Mortier, 501 US ___, 111 S Ct 2476; (1991) at page 2490, line 26).

The fact that the U.S. Supreme Court is reviewing Easterwood is particularly important to the City of Fenton because the Michigan Supreme Court based its decision to deny the relief sought in the City of Fenton's appeal upon the principles set forth by the U.S. Court of Appeals in Easterwood v CSX Transportation, Inc., 933 F 2d 1548 (11th Cir. 1991).

The Michigan Supreme Court quoted the following from the U.S. Court of Appeals Opinion:

> "While the appellant assumes that the speed limits are designed to prevent derailments, it is equally valid to assume that the speed limits were set low enough that, in conjunction with adequate grade crossing signals and gates, the speed limits were intended to lessen the number of grade crossing accidents as well as lessen the chances of derailments." (Petition for Writ of Certiorari to the Michigan Supreme Court page 13a).

The Michigan Court then ruled:

> "We find Judge Johnson's opinion in Easterwood to be soundly reasoned and persuasive, and we therefore conclude that the

Secretary of Transportation has covered the subject matter sought to be addressed by Fenton's ordinance." (Petition for Writ of Certiorari No. 91-2004.)

A considerable difficultly could arise if the U.S. Supreme Court were to not grant the City of Fenton's Petition for Writ of Certiorari and then rule in favor of the-Cross-Petitioner in Easterwood. All municipalities in Michigan by staré decisis and all municipalities throughout the United States by analogy to the Michigan Supreme Court ruling would be prohibited from enforcing freight train speed ordinances even though the U.S. Supreme Court would have indicated that the U.S. Court of Appeals was in error in finding preemption.

The consequences of this judicial

noose would be to lead to more unnecessary casualties at railroad crossings that are congested. Solicitor General Starr has aptly stated the safety problem as follows:

> "Railway grade crossing accidents are regrettably common, and thus continue to pose a serious threat to life and property. The Department of Transportation reports that in calendar year 1990 there were 5,022 motor vehicle accidents at railroad-highway crossings, resulting in 568 deaths and 2,186 injuries...This volume of accidents suggests that the underlying legal issues warrant review by this Court." (Brief for the United States As Amicus Curiae, page 12).

III. REQUEST TO DEFER DECISION ON CITY OF FENTON'S PETITION FOR WRIT OF CERTIORARI UNTIL AFTER EASTERWOOD IS DECIDED

The efficient administration of justi e would be enhanced by this Honorable Court if the Petition for Writ of Certiorari in City of Fenton v Grand Trunk was to be held back for decision until after Easterwood is decided. If the U.S. Supreme Court found that there was no preemption by the Federal Railway Safety Act in Easterwood, then the high court would be in a position to reverse and vacate the decision of the Michigan Supreme Court below and declare the City of Fenton's freight train speed ordinance to be constitutional without the need for briefs and oral argument.

It is important to note that in the event the high court determines that there

was preemption in Easterwood under the first exception to preemption, there still would remain the question of whether the City of Fenton came within the so called second exception to preemption which reads in pertinent part:

> "A state [**or a city by delegation of authority or leaving local regulation in the hands of local government according to Wisconsin Public Intervenor v Mortier, 501 US ___; 111 S Ct 2476 (1991) page 2478, line 4**] may adopt or continue in force an additional more stringent law...or standard relating to railroad safety when necessary to eliminate or reduce an essentially local safety hazard..." 45 USC 434.

Petitioner, City of Fenton, prays that the United States Supreme Court defer

decision on its Petition for Writ of Certiorari until after a decision has been reached in Easterwood.

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Attorney for Petitioner
City of Fenton

Dated: September ___, 1992.